Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investments Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J–02–213 OF 1994
GOPAL SRI RAM, SITI NORMA YAAKOB JJCA AND MOKHTAR SIDIN J
27 MAY 1996

Contract *— Building contract — Variations in the work — Contractor requested to undertake additional works on project — Delay in completion of houses on stipulated date — Whether time ceased to be of essence of agreement — Whether contractor liable to liquidated damages under agreement for late delivery*

Civil Procedure *— Trial — Conduct of proceedings — Cross-examination — Point not raised in cross-examination — Whether judge entitled to treat it as abandoned*

Civil Procedure *— Appeal — Adducing of fresh evidence — Issue never arose for determination in High Court as it was not pleaded anywhere in defence — Evidence available at trial — Whether evidence relevant — Whether appellate court would exercise discretion by permit admission*

By a written agreement ('the agreement'), the respondent ('the defendant') had contracted with the appellant ('the plaintiff') to provide labour for certain construction work of 90 units of dwelling houses in Johore Bahru. The houses were to be completed within 10 months from the date of the agreement. The plaintiff alleged that the defendant had failed to deliver the 90 units of houses on the completion date, and had therefore filed a claim for liquidated damages of RM50 per day per house under cl 27 of the agreement. The plaintiff based the calculation of late delivery on the architect's certificate of completion and claimed for a total of RM2,461,750. The High Court judge allowed the plaintiff's claim for RM804,800 with interest and costs, after making deductions for the delay caused by plaintiff in pecking boundary stones, delay caused by rainy days, and the fact that the delay in issuance of architect's certificate might be due to the fault of other parties. The judge had also entered judgment on the defendant's counterclaim for RM63,375 being a sum detained by the plaintiff for the works completed under the agreement together with interest. The defendant appealed against the part of judgment which was in the plaintiff's favour. At the commencement of the appeal, the defendant moved the court for leave to adduce further evidence on the issue of the capacity in which the defendant had been sued. The defendant went on to attack the judge's findings which was made in the plaintiff's favour, on the ground that the judge had overlooked the fact that the plaintiff had requested the defendant to undertake additional works on the project in question, all of which caused the delay in the completion of the houses on the stipulated date. The

A defendant alleged that time ceased to be of the essence under the building contract when additional works were ordered and undertaken, and the plaintiff was accordingly, not entitled to receive any liquidated damages under the agreement ('the defendant's proposition'). Meanwhile, counsel for the plaintiff contended that the operation of the principle in the defendant's proposition had been excluded, on the grounds that: (i) there was an express provision for the calculation of the damages that were to be paid for the period of delay in the agreement; (ii) the extra work spoken of by the plaintiff were quite separate from the works contracted for, and that payment for these works was separately made; and (iii) it was not part of the defendant's case that the delay had been occasioned by the extra works as there was absence of any suggestion during the cross-examination of the plaintiff's witness to the effect that the delay had been caused by such work.

Held, dismissing the appeal:

(1) This court refused leave to adduce further evidence on two main grounds. First, the issue of capacity was one which never arose for determination in the court below as it was not pleaded anywhere in the defence. It was therefore entirely irrelevant and inadmissible. Secondly, the evidence in question was not put in although it was available at the trial. It followed that one of the vital conditions upon which was dependent the exercise of discretion by an appellate court to permit fresh evidence was absent. Thus, the evidence, even if relevant (which was not the case), was not, on the basis of the exercise of discretionary power, admissible (see pp 600H–I and 601A-B); *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 followed.

(2) For the reasons advanced by counsel for the plaintiff, the court was of the opinion that there was no merit in the argument advanced by counsel for the defendants (see p 604B–C).

(3) The trial judge was entirely right in ignoring the point that the delay had been caused by the so-called extra works because it was not pursued under cross-examination of the plaintiff's witness. The judge was thus entitled to proceed upon the basis that the defendant was no longer advancing this as a reason for the delay (see p 604C); *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770.

(4) At the end of the day, this was a case which turned upon the findings of primary fact made by a judge based upon the credibility of witnesses whom he had seen and heard and upon the undisputed material presented to him. Indeed, this court found that there was abundant evidence on record to support those findings. In these circumstances, this court must defer to the views expressed by the trial judge (see p 604E).

[**Bahasa Malaysia summary**

Menurut suatu perjanjian bertulis ('perjanjian tersebut'), penentang ('defendan') telah mengikat kontrak dengan perayu ('plaintif') untuk menyediakan tenaga kerja untuk kerja pembinaan tertentu 90 unit rumah kediaman di Johor Bahru. Rumah-rumah itu harus disiapkan dalam masa 10 bulan daripada tarikh perjanjian. Plaintif mendakwa bahawa defendan telah gagal untuk menghantar-serah 90 unit rumah tersebut pada tarikh penyiapan, dan plaintif dengan itu telah memfailkan tuntutan untuk ganti rugi jumlah tertentu sebanyak RM50 sehari untuk setiap buah rumah di bawah fasal 27 perjanjian tersebut. Plaintif mendasarkan pengiraan kelewatan hantar-serah kepada sijil penyiapan arkitek dan menuntut jumlah sebanyak RM2,461,750. Mahkamah Tinggi membenarkan tuntutan plaintif sebanyak RM804,800 bersama dengan faedah dan kos, setelah membuat penolakan kerana kelewatan yang disebabkan oleh plaintif dalam mencatuk batu sempadan, kelewatan yang disebabkan oleh hari hujan dan kenyataan bahawa kelewatan dalam mengeluarkan sijil arkitek mungkin disebabkan oleh kesilapan pihak-pihak yang lain. Hakim juga telah memberikan penghakiman terhadap tuntutan balas defendan sebanyak RM63,375 iaitu jumlah yang ditahan oleh plaintif untuk kerja-kerja yang disiapkan di bawah perjanjian tersebut bersama dengan faedah. Defendan merayu terhadap bahagian penghakiman yang memihak kepada plaintif. Pada permulaan rayuan, defendan telah memohon kebenaran mahkamah untuk mengemukakan bukti-bukti lanjut mengenai isu keupayaan di mana defendan telah disaman. Defendan seterusnya mengkritik pendapat hakim yang memihak kepada plaintif, atas alasan bahawa hakim itu telah terlepas perhatian terhadap kenyataan bahawa plaintif telah meminta defendan untuk menjalankan kerja-kerja tambahan di projek berkenaan, kesemuanya menyebabkan kelewatan dalam penyiapan rumah-rumah itu pada tarikh yang ditetapkan. Defendan mendakwa bahawa masa tidak lagi merupakan inti pati di bawah kontrak pembinaan apabila kerja-kerja tambahan diarahkan dan dijalankan, dan plaintif dengan demikian, tidak berhak untuk menerima apa-apa ganti rugi jumlah tertentu dibawah perjanjian tersebut ('kenyataan defendan'). Sementara itu, peguam pihak plaintif menegaskan bahawa prinsip dalam kenyataan defendan tidak terpakai, atas alasan bahawa: (i) terdapat peruntukan nyata untuk pengiraan ganti rugi yang kena dibayar untuk tempoh kelewatan dalam perjanjian tersebut; (ii) kerja-kerja tambahan yang dinyatakan oleh plaintif adalah agak berasingan daripada kerja-kerja yang diikat kontrak, dan bahawa bayaran untuk kerja-kerja tersebut dibuat secara berasingan; (iii) adalah bukan sebahagian daripada kes defendan bahawa kelewatan disebabkan oleh kerja-kerja tambahan kerana tidak terdapat cadangan semasa pemeriksaan balas saksi pihak plaintif yang menunjukkan bahawa kelewatan itu telah disebabkan oleh kerja-kerja itu.

Diputuskan, menolak rayuan itu:

(1) Mahkamah ini menolak kebenaran untuk mengemukakan bukti lanjut atas dua alasan utama. Pertama, isu keupayaan tidak pernah timbul untuk penentuan di mahkamah rendah kerana ia tidak dikemukakan di mana-mana dalam pembelaan. Oleh itu ia adalah tidak relevan dan tak boleh diterima. Kedua, bukti berkenaan tidak dikemukakan walaupun ia ada semasa perbicaraan. Ekoran itu, satu daripada keadaan yang penting yang diperlukan oleh mahkamah rayuan untuk menggunakan budi bicaranya supaya membenarkan bukti yang baru, tidak wujud. Oleh itu, bukti itu, jika relevan (tidak relevan dalam kes ini), tidak boleh diterima, berdasarkan kepada penggunaan kuasa budi bicara (lihat ms 600H–I dan 601A-B); *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ diikut.

(2) Akibat sebab-sebab yang dikemukakan oleh peguam pihak plaintif, mahkamah berpendapat bahawa tidak ada merit dalam hujah yang dikemukakan oleh peguam pihak defendan (lihat ms 604B–C).

(3) Hakim perbicaraan adalah betul sepenuhnya dalam tidak mengambil kira bahawa kelewatan telah disebabkan oleh apa yang dikatakan kerja-kerja tambahan, kerana ia tidak diteruskan semasa pemeriksaan balas saksi pihak plaintif. Oleh itu, hakim adalah berhak untuk mengendalikan kes atas dasar bahawa defendan tidak lagi mengemukakan alasan ini sebagai sebab kelewatan (lihat ms 604C); *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770.

(4) Pada akhirnya, ini adalah satu kes yang bergantung kepada pencarian fakta utama yang dibuat oleh hakim berdasarkan kebolehpercayaan saksi-saksi yang telah dilihat dan didengarnya, dan bahan yang tidak dipertikaikan yang dikemukakan kepadanya. Malahan, mahkamah ini mendapati bahawa terdapat banyak bukti dalam rekod untuk menyokong pencarian itu. Dalam keadaan ini, mahkamah ini mesti dengan hormatnya menurut pandangan yang dinyatakan oleh hakim perbicaraan (lihat ms 604E)].

Notes

For cases on building contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1245–1337.

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on trial, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3593–3642.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70
SMK Cabinets v Hili Modern Electrics Pty Ltd [1984] VR 391

Appeal from: Civil Suit No 742–1984 (High Court, Johor Bahru)

M Pathmanathan (*RA Kumar* with him) (*Rina Noor & Co*) for the appellants.
Syed Ahamad Sadik (*CS Tam & Co*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): The appellants before us were the defendants in the court below. The respondent was the plaintiff. We will, for convenience, refer to them throughout this judgment as 'plaintiff' and 'defendants'.

On 8 October 1994, the High Court at Johor Baru entered judgment in the plaintiff's favour for the sum RM804,800 together with interest and costs. The defendants had, in the action brought by the plaintiff, delivered a defence and counterclaim. The learned judge who tried the action entered judgment on the counterclaim for a sum of RM63,375. This appeal is directed only against so much of the learned judge's judgment as found for the plaintiff. There is no cross-appeal by the plaintiff against the award made on the counterclaim.

Before dealing with the facts as are relevant to the appeal, there is one matter we may dispose of quite shortly.

At the commencement of the appeal, the defendants moved this court for leave to adduce further evidence on the issue of the capacity in which the defendants had been sued. This is the way in which counsel put it. The statement of claim alleged that the defendants were trading as a firm. That may have been true when the action was commenced. But there was no plea that the defendants were partners at all material times. In truth, they had been sued in their individual capacity. It was now proposed to adduce evidence to show that the defendants were not partners when the alleged liability accrued. So much for the argument.

We refused leave to adduce further evidence on two main grounds. First, nowhere in their defence did the defendants plead the fact that they were merely partners of the firm at the date of the action but not when the liability accrued. Had they done so, it would have become necessary for the trial judge to determine that issue. But nothing of the sort was ever done. The issue was one which never arose for determination. The fresh evidence was therefore being sought to be put in on a matter that had not arisen in the court below. It was therefore entirely irrelevant and for that reason, inadmissible.

Second, counsel for the defendants before us frankly conceded that the evidence in question was available at the trial. Yet it was not put in. It follows, therefore, that one of the vital conditions upon which is dependent the exercise of discretion by an appellate court to permit fresh evidence was absent. (See *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70). The evidence — even if relevant (which is not the case) — was not, on the basis of the exercise of discretionary power, admissible.

With that we now turn to consider the background of the factual matrix against which this appeal arose. This has been dealt with at length and with great care by the learned judge. We therefore find it quite sufficient for this purpose to extract the relevant passages from his judgment:

> The plaintiffs' claim against the defendants is for a sum of RM2,461,750 being liquidated damages for the delay in completing 90 units of dwelling houses.
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> The plaintiffs alleged that by a written agreement dated 11 August 1981, the defendants contracted with the plaintiffs to provide labour for masonary, carpentry and steel bending for the construction of 90 units of dwelling house to be erected on Taman Sri Setia in Johore Bahru. The 90 units of houses were to be completed within 10 months from date of the agreement, which was 11 June 1982. According to the plaintiffs, the defendants failed to do so, and under cl 27 of the agreement, they are entitled to liquidated damages of RM50 per day per house. To support this claim for RM2,461,750 the plaintiffs based their calculation on the completion of the said house according to a chart, tendered in evidence as P6.
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> The defendants' defence asserted that they had completed 46 units on 31 January 1983 and 44 units on 31 March 1983. Further, they alleged that the plaintiffs had breached the agreement by inter alia;
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> (a) failing to plant relevant boundary stones on the site for two months after the date of the agreement;
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> (b) delaying the supply of various raw materials to enable the defendants to proceed with their work;
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> (c) requesting the defendants to carry out additional and extra work;
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> all of which caused the delay in the completion of the houses on the stipulated date.
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> The defendants also alleged that the plaintiffs had failed to deduct for rainy days and the days affected by the Chinese New Year celebration.
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> Besides the defence, the defendants are also making a counterclaim for:
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> (a) a sum of RM63,375 being a sum detained by the plaintiffs for the works completed under agreement together with interest;
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> (b) RM12,556.50 being outstanding balance sum due to the defendants by the plaintiffs for additional works carried out by the defendants for the plaintiffs; and
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> (c) damages, interest and cost.
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> After having considered the evidence tendered in this case, I make the following findings:

(1) The 90 units of houses were completed on: (a) 31 January 1983 for 46 units; and (b) on 31 March 1983 for 44 units. This is as stated in para 6 of the statement of defence which was never denied or traversed upon by the plaintiffs in their reply and defence to counterclaim. As such it is deemed to be admitted by the plaintiffs. In addition to this, PW1, the chief executive of the plaintiffs, admitted in evidence that he thought the houses were completed by the defendants 'sometime in January 1983'. Such being the case, the dates tendered by the defendants should be correct.

(2) Flowing from the above, the claim by the plaintiffs based on dates stated in P6 cannot be accepted. The dates in P6 used for calculation of late delivery of the houses were, as admitted by PW2, based on the architect's certificate of completion. Before such certificate can be issued, the whole house including painting and other works not involving the defendants must be completed. As the defendants were not responsible for any other works except those mentioned in the agreement, any delay in the issuance of the architect's certificate that may be due to the fault of others cannot be attributed to the defendants.

The learned judge, having subjected the evidence and the rival claims by the parties to careful scrutiny, concluded as follows:

This court finds that:

(1) There is a delay of 234 days (from 11 June 1982 to 31 January 1983) for completing 46 units of houses by the defendants. From this a deduction of 84 days (54 for rainy days and 30 days for delay in pecking of boundary stones) should be allowed. This gives a balance of 150 days' delay. As each day's delay is RM50, for 150 days it would be RM50 x 150 = RM7,500 per unit. As there are 46 units, the total sum of RM345,000 (46 x RM7,500) should be awarded as liquidated damages against the defendants under this item.

(2) There is a delay of 293 days (from 11 June 1982 to 31 March 1983) for completing 44 units of houses by the defendants. From this, a deduction of 84 days (54 for rainy days and 30 days for delay in pecking of boundary stones) should be allowed. This gives a balance of 209 days' delay. As each day's delay is RM50, for 209 days it would be RM50 x 209 = RM10,450 per unit. As there are 44 units, the total sum of RM459,800 (44 x RM10,450) should be awarded as liquidated damages against the defendants under this item.

(3) The total of (1) and (2) above is RM804,800.

The plaintiffs' claim is therefore allowed for RM804,800 with interest at 8% per annum from the date of this judgment to the date of realization. This court also allows cost to the plaintiffs.

As there is no set-off pleaded by the defence, this court allows the defendants' counterclaim of RM63,375 with interest of 8% per annum on the judgment sum from the date of filing the counterclaim to the date of realization. This court also allows cost for the defendants' counterclaim.

Before us, the findings made by the learned judge in the plaintiff's favour were attacked on the ground that the learned judge overlooked a matter that was vital upon the issue of delay. It is that the plaintiff had requested

to undertake additional works on the project in question. As a result, time ceased to be of the essence, and the plaintiff was not entitled to receive any liquidated damages whatsoever under the agreement between the parties.

In support of the proposition that time ceases to be of the essence under a building contract when additional works are ordered and undertaken, counsel cited and relied on the decision of the Full Court of Victoria in *SMK Cabinets v Hili Modern Electrics Pty Ltd* [1984] VR 391, where all the relevant authorities upon the subject have been usefully collected and discussed. For present purposes, it is sufficient to quote from that portion of the headnote to the report which accurately sets out the principles. It reads as follows:

> (1) Under a building contract, the proprietor cannot recover liquidated damages from the contractor for delay in completion where the proprietor himself delays completion by ordering extras or other variations, unless the contract makes it clear that the contractor is undertaking to complete by the due date notwithstanding extras or other variations or unless resort can be had to an appropriate extension of time clause.
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> (2) The ordering of variations after the due date for completion which substantially delays completion will, unless the contract provides otherwise, and in the absence of an applicable extension of time clause, disable the proprietor from recovering or retaining liquidated damages which might otherwise have accrued after the giving of the order, although the proprietor's rights in respect of amounts already accrued by way of liquidated damages will not be affected.
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> *Anderson v Tuapeka County Council* (1900) 19 NZLR 1; *Baskett v Bendigo Gold Dredging Co Ltd* (1902) 21 NZLR 166, referred to.
>
> (3) Unless the contract provides otherwise, liquidated damages for delay in completion cannot be recovered by the proprietor where the ordering of extras or other variations causes or contributes to the delay in completion, notwithstanding that the contractor may in fact have disable himself by his own delays from completing by the due date.

It is axiomatic that for this principle of law to apply, there must first be in existence a substratum of facts, the existence of which is postulated by the principle. Absent such facts, and the proposition becomes quite irrelevant.

Counsel for the plaintiff before us, in opposing the applicability of the principle relied upon by the defendants, cited three circumstances that exclude its operation. First, he says that there is in the present case an express provision in the contract between the parties for the calculation of the damages that are to be paid for the period of delay.

Second, counsel has referred us to the evidence in the record provided and relevant to the topic under discussion which supports the conclusion that the extra work spoken of by the plaintiffs were quite separate from the works contracted for. Payment for these works was separately made. The so-called extra works have, therefore, no nexus whatsoever with the claims that were presented to the judge

Third, counsel has drawn our attention to the absence of any suggestion during the cross-examination of the plaintiff's witness to the

effect that the delay had been caused by the extra work. Since the point was of such critical importance to the defendant, it ought to have been put to the plaintiff's witness during cross-examination. Failure to do so would have an adverse effect upon the defendants' case. It would mean that it was not part of their case that the delay had been occasioned by the ordering and the execution of the so-called extra works.

Having given much consideration to the arguments addressed to us by both counsel, we came to the conclusion that there is much force in the submissions made by counsel for the plaintiff. For the reasons advanced by him and adverted to a moment ago, we were of the opinion that there was no merit in the argument advanced by counsel for the defendants.

In our judgment, the learned judge was entirely right in ignoring the point because it was not pursued under cross-examination of the plaintiff's witness. In the absence of a suggestion that the delay had been caused by the so-called extra works, the judge was entitled to proceed upon the basis that the defendants were no longer advancing this as a reason for the delay. The effect of a party failing to put its case squarely to its opponent's witness has been sufficiently addressed by this court in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794 and we find it unnecessary to repeat what was there said.

At the end of the day, this is a case which turns upon the findings of primary fact made by a judge based upon the credibility of witnesses whom he had seen and heard and upon the undisputed material presented to him. We accept those findings without any reservation. Indeed, we find that there is abundant evidence on record to support those findings.

In these circumstances, we, sitting here as an appellate court must — and do — respectfully defer to the views expressed by the learned judge. The defendants have singularly failed to demonstrate any error on the part of the learned judge.

For these reasons, the appeal was dismissed with costs. All orders made by the learned judge were affirmed. The deposit paid into court by the defendants was ordered to be paid out to the plaintiff to account of its taxed costs.

Order accordingly.

Reported by Isabel Liong